IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 1213 of 1997

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ? No.

2 To be referred to the Reporter or not ? No.

3 Whether their Lordships wish to see the fair copy of the judgment ? No.

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ? NO.

5 Whether it is to be circulated to the civil judge ? No.

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HARIJAN DANA SOMA PARMAR - Appellant(s)
Versus
STATE OF GUJARAT - Opponent(s)

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Appearance :
MR YOGESH S LAKHANI

for MR KEDAR G DAVE for Appellant(s) : 1,
MR HM PRACHCHHAK, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE

and

HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

Date : 21/06/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE BANKIM.N.MEHTA)

1. The present appeal has been preferred under Section 374 (2) of the Code of Criminal

Procedure, 1973 challenging the judgment dated 20-10-1997 passed by the learned Addl. Sessions Judge, Junagadh in Sessions Case No. 64 of 1995 convicting the appellant for the offence punishable u/s 302 of the I.P. Code and sentencing him to undergo life imprisonment and pay fine of Rs.1000/- in default thereof to undergo further imprisonment for 15 days.

2. The facts of the prosecution case, in brief, are that the complainant Ramaben wife of Babu Rama lodged the complaint before Maliya Hatina Police station on 21-10-1994 alleging that she is sister in law i.e. Nanand (sister of the husband) of deceased Khimiben who was married to the appellant before about 15 years of the incident. Deceased Khimiben had four daughters and one son. The deceased had returned to her parents' house at Ambecha on account of quarrels with her husband Dana. The complainant along with Khimiben and maternal aunt Maniben went to the market at Maliya in the mourning at about 9-30 O'clock and they were standing at the market to purchase articles. At that time, around 11-30 O'clock in the morning the appellant and his father Soma Masari came there. Soma Masari caught hold of Khimiben @ Vijaya and the appellant took out a knife and gave 6 to 7

knife blows on back, hands, chest and stomach of Khimiben as a result of which Khimiben fell down on the road. The complainant and Maniben took Khimiben to the Government Hospital where she was declared dead.

3. On the basis of this complaint, the offence was registered as I - CR No. 58 of 1994 at Maliya Hatina Police Station for the offences punishable u/s 302-34 of the I.P. Code and 135 of the Bombay Police Act and the investigation was started. The appellant and his father Soma Masari were arrested on 22-10-1994. On completion of the investigation, the charge sheet was filed before lereaned Judicial Magistrate, First Class, Veraval, Dist. Junagadh. Since the offence punishable u/s 302 of the I.P.Code is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Junagadh and it was registered as Sessions Case No.64 of 1995.

4. The learned Addl. Sessions Judge, Junagadh framed the charge Exh. 1 against the appellant and his father co-accused for the offences punishable under Sections 302-34 of the I.P. Code and u/s 135 of the Bombay Police Act. The charge was read over and explained to them. The

appellant and co-accused pleaded not guilty to the charge and demanded to be tried. Therefore, the prosecution adduced evidence to prove the guilt of the accused. After closure of the prosecution evidence, further statements of the accused were recorded u/s 313 of the Code of Criminal Procedure, 1973, wherein the accused denied having committed the offence and stated that they were been falsely implicated in the case. After hearing the learned A.P.P. and advocate for the accused, the trial Court found the present appellant guilty for the offence punishable u/s 302 of the I.P. Code and imposed the aforesaid punishment. However, co-accused was acquitted for the offence charged against him. Therefore, the present appeal.

5. Learned advocate Mr. Y.S. Lakhani for Mr. Kedar G. Dave for the appellant submitted that the prosecution has not proved the case against the appellant beyond reasonable doubt. Accoridng to them, the witnesses have not properly supported the prosecution case as the witnesses who have been examined as eye witnesses have been declared hostile therefore their version cannot be made basis for conviction. He also submitted that the medical evidence also raises doubt about the injuries which resulted into death of

Khimiben and the prosecution has not proved that the injuries were caused by the weapon allegedly recovered from the appellant. It was argued that the panch witnesses have also not supported the prosecution and therefore the panchanama of recovery of weapon cannot be believed and relied upon. He also submitted that that the witnesses could not be said to be the eye witnesses and hence their evidence cannot be relied upon. It was pleaded that no independent witnesses have been examined and it is not proved that the weapon recovered was used in commission of the offence. It was argued that there are serious discrepancies in the prosecution case and hence the appellant could not have been convicted and therefore he is required to be acquitted.

6. Learned A.P.P. Mr. H.M. Prachchhak submitted that simply because the witnesses have turned hostile their evidence cannot be thrown away. The evidence supporting the prosecution can always be accepted by the Court and on such evidence the accused can be convicted. He also submitted that the medical evidence supports the prosecution case and simply because there are minor contradictions in the evidence, the prosecution case does not become doubtful. He

submitted that the prosecution case cannot be disbelieved only because the witnesses are related to the deceased and as the facts of the case clearly indicate that the appellant whose name was disclosed as assailant at the earliest opportunity was involved in the offence his conviction should be upheld. He submitted that the prosecution has proved the case beyond reasonable doubt against the appellant and no interference is warranted in the judgment and conviction passed by the trial Court.

7. Learned counsel for the parties have relied on various decisions which have been discussed in this judgment at appropriate stage.

8. We have considered rival submissions made by the learned counsel for the parties and have gone through the judgment of the trial court as well as record and proceeding of the case.

9. It emerges from the evidence on record that the prosecution case mainly depends on the medical evidence and oral evidence of the complainant P.W. 2 Ramaben Babubhai Exh. 21 and P.W. 3 Maniben w/o Harsukhbhai Danabhai Exh.23. It also appears from the record and proceeding of

the case that after recording of the evidence was over, the prosecution declared closure of its case. Thereafter, further statements of the accused under Section 313 of the Criminal Procedure, 1973 were recorded. Thereafter, the prosecution moved an application Exh. 42 before the trial Court to recall the witnesses namely P.W. 2 Ramaben Exh.21 and P.W. 3 Maniben Exh.23. After hearing the learned advocates for the parties, the learned trial Judge permitted the prosecution to recall the said witnesses. Pursuant to that order, both the witnesses were recalled and thereafter the witnesses were declared hostile and the learned A.P.P. was permitted to cross-examine the witnesses.

10. In order to prove the medical evidence, the prosecution has examined P.W. 1 Dr. Mohanbhai Karmashibhai Thummar at Exh.7 who had performed postmortem examination of the victim Khimiben Danabhai. This witness in his examination-in-chief described the various injuries found on the person of Khimiben. According to this witness, there were about ten external injuries of different measurement found on the person of Khimiben. According to this witness, the cause of death was excessive bleeding due to the injuries and such excessive bleeding was on account of

the internal injuries No. 1, 2, 9 and 10 of Exh.9. He has also deposed that internal injuries No. 1, 2,9 and 10 could be caused by forceful blow of knife. In the cross-examination, this witness has deposed that he had not seen the weapon which had caused the injuries. He has also admitted that the injuries would depend upon the nature of knife. This witness has admitted that the injuries found on the person of victim Khimiben were possible by two different weapons. He has admitted that he could not say without seeing the size of the knife whether the injuries found on the person of victim Khimiben were caused by the knife. He has also stated in his deposition that he found the following external injuries on the person of the deceased at the time of postmortem examination :

(i) An incised or stab wound situated 2 cms., above umbilicus at mid line size 2½ cms x 1 cms., upto abdominal cavity, oblique direction medial to lateral to left side margin clean-cut up to angle sharp lower angle not well defined or rough.

(ii) An incise or stab wound situated below the coastal margin left side 7 cms., above the umbilicus and 3½ away from mid-line oblique direction medial to lateral left side size 2½ cms. X 1 cms., upto abdominal

cavity margin clean-cut upper angle sharp and lower angle rough or not well defined.

(iii) An incised wound on left side chest 1 cm., above the nipple transverse direction 5 cm. X 1 cm., up to muscle deep and breast tissue come out from wound, margin clean-cut, both angles sharp.

(iv) An incised wound on left upper arm below 15 cms., from tip of left shoulder. Parallel to born direction from above down word 5 cms. X 1 cm., margin clean-cut, both angles sharp deep up to born lateral aspect.

(v) An incised or stab wound at left side back 2 cms., away on vertebral column and 14 cms., above the sacral promontory 2½ cms. X 1 cm., oblique direction margin clean-cut, upper angles are, lower angle rough.

(vi) An incised wound and left mid axillary line at the level of nipple and 7½ cms., away from nipple laterally 1 cms x 1 cms., vertical direction, both angles sharp, margin clean-cut deep up to skin.

(vii) An incised wound on right forearm lateral aspect 7 cms below the elbow 1½ cms x 1 cms., oblique direction margin clean-cut, both angles are up to skin.

(viii) An incised wound on tip of iliac crest, oblique direction 1 cm. X ½ cm., margin clean-cut both angle sharp deep cut to muscles.

(ix) An incised or stab wound on right side at mid., axillary above 5 cms., from bony prominent 2½ cms. x 1 cms. oblique direction, lateral to medial margin clean-cut, upper angle sharp, lower rough or not well defined, lateral to medial forwarded down word.

(x) An incised or stab wound on posterior axillary line below the postal margin, 2½ cms. X 1 cms., margin, clean-cut oblique direction lateral to medial from upward – down word, upper angle sharp, lower angle rough or not well defined.

(xi) Bandage on light calf., removed bandage and old injury on right calf and healing.

11. In view of this oral evidence, though it is proved that the deceased died was a homicidal death, it becomes clear that the Doctor who had performed postmortem examination of Khimiben was not shown the weapon allegedly used in the commission of the offence. The medical evidence also indicates that the injuries were possible by two different weapons and it was not possible for the Doctor to say without seeing the weapon as to whether the injuries were caused by knife. IN view of this, it would be difficult to believe that the injuries found on the dead body of the victim were caused by muddamal article knife. In view of this, in our considered opinion, the prosecution has failed to prove beyond reasonable doubt that the injuries found on the dead body of victim Khimiben were caused by muddamal article knife.

12. The prosecution has examined the complainant P.W. 2 Ramaben Babubhai at Exh.21 who has been declared hostile. It is true that the evidence of the hostile witness cannot be outrightly thrown away. The court can appreciate the material available from such witnesses either in

support of the prosecution or in support of the case of the accused. In view of this settled principle, the evidence of P.W. 2 Ramaben Exh.21 is required to be appreciated.

13. The complainant P.W. 2 Ramaben Exh.21 has time and again changed her version. Initially, this witness supported the prosecution case. However, in the cross-examination, this witness deviated from her original version and supported the defence. Thereafter, the court put a straight question and in reply to that question, this witness admitted that the appellant inflicted blow to deceased Khimiben. Thereafter, the prosecution gave application exh.42 to permit the prosecution to recall the witnesses. Pursuant to that, this witnesses was cross-examined by the learned A.P.P. wherein again this witness admitted that in the complaint she had stated the facts of the incident.

14. P.W. 2 Ramaben Exh. 21 was again cross-examined by the defence witness wherein again this witness changed her version and stated that she did not file the complaint and the complaint was not written in her presence. Thereafter, this witness stated that she had dictated the complaint but she did not know

whether the complaint was read over to her and her thumb impression was obtained. Learned advocate Mr. Lakhani appearing for Mr. Kedar G. Dave for the appellant submitted that the P.W. 2 Ramaben is an illiterate lady and hails from economically backward strata of the society and she may not be fully aware about the consequences of her deposition and therefore her deposition cannot be relied on.

15. Learned A.P. P. Mr. Prachchhak submitted that P.W. 2 Ramaben Exh.21 being illiterate lady would never say lie and would always say truth and therefore her deposition should be relied upon.

16. The prosecution has produced F.I.R. at Exh.22 before the trial court. As per the complaint exh.22 the complainant P.W. 2 Ramaben along with Khimiben and Maniben were standing at the market and at that time father-in-law of Khimiben came there and co-accused Somabhai caught hold of Khimiben whereas the appellant gave six to seven knife blows on various parts of the person of Khimiben. In her oral deposition at Exh.21 she has not stated about role allegedly played by co-accused Somabhai i.e. father-in-law of Khimiben nor she has stated about the presence

of co-accused Somabhai at the time of the incident. Thus, oral version of P.W. 2 Ramaben Exh.21 does not inspire confidence because she has not adhered to her version of the incident as narrated in the complaint..

17. It is to be noted that P.W. 2 Ramaben Exh.21 had time and again changed her version and therefore she was declared hostile.

18. It appears from the earlier part of evidence of this witness P.W. 2 Ramaben Exh. 21 that she has stated that after the incident the injured fell down inside the shop and became unconscious. But subsequently, she changed her version and stated that the appellant had inflicted injuries to the victim. Thereafter, when she was cross-examined by the defence advocate, she has again changed her version. In view of this, this witness has time and again changed her oral version and it is not safe to rely upon her evidence for basing conviction of the appellant.

19. Learned A.P.P. in support of his submission that portion of the evidence in favour of the prosecution may be accepted has relied on the decision of the Supreme Court in the case of

Gurpreet Singh Vs. State of Haryana, reported in AIR 2002 SC 3217. The principle laid down therein can hardly be dispued. However, on close scrutiny, the evidence of P.W. 2 Ramaben exh.21 does not inspire confidence and therefore, the said decision of the Supreme Court cannot be made applicable to the facts of the present case. Similarly, he has also relied on the decision of the Division Bench of this Court in the case of Gujarat State Road Transport Corporation Vs. Isuf Ismail Mansuri reported in 2000 (2) G.L.H. 1631, wherein the same law has been laid down by this Court.

20. It may be stated that the deceased was related to the complainant and the assailant was related to the witnesses. However, it cannot be said that simply because the witnesses were related either to the victim or the assailant, their evidence cannot be relied. The materials placed on the record do not indicate that on account of family quarrels there were disputes between two families. Except oral version of this witness, there is no other evidence on record to infer strained relations between the victim and the appellant.

21. In view of above discussion, the evidence of

this witness does not inspire confidence and therefore it would not be safe to rely upon the evidence of this witness to connect the appellant with the offence charged against him.

22. It is pertinent that the alleged accident took place in broad day light in the market. The statements of other witnesses were recorded during the investigation. However, strangely no independent witness has been examined except P.W. 8 Rajesh Gokaldas Exh.28. Even the evidence of this witness does not lend any support to the prosecution case. Therefore, by solely relying upon on the evidence of P.W. 2 Ramaben Exh.21 it would not be safe to accept the prosecution case. One more fact is required to be considered. According to the prosecution case the deceased had disputes with the appellant and as a result thereof the deceased resided at her parents' house for some time. In view of this also it would not be safe to rely on the evidence adduced by the prosecution to case conviction.

23. It is obvious that P.W. 2 Ramaben Exh.21 being sister-in-law (Nanand i.e.husband's sister) of victim she has tried to see that she supports the prosecution case. In view of this relation, without there being evidence of any independent

witness, it would not be safe to rely upon the evidence of this witness more so when there is no medical evidence to support the injuries caused to the deceased with the weapon recovered from the appellant.

24. The prosecution has also examined P.W. 3 Maniben Harukhbhai at Exh.23. This witness has also been declared hostile and she has time and again changed her version. In the initial part of her version, this witness supported the prosecution case. But thereafter she has deviated from the prosecution case and supported the defence and hence she was been declared hostile. This witness in her deposition stated that when she along with deceased was standing in the shop the appellant along with his father – co-accused Somabhai came and co-accused Soma caught hold of Khimiben and the appellant inflicted injuries. This version is contradictory to the oral version given by the complainant P.W. 2 Ramaben Exh. 21 as the said witness has not deposed about the presence of the co-accused Somabhai. Furthermore, this witness has stated that the incident took place in the shop, whereas other evidence on record indicates that the incident took place in the market. In view of this discrepancy in the

evidence, it would be unsafe to rely upon the evidence of this witness.

25. The prosecution has also examined P.W. 8 Rajesh Gokaldas Exh.29 who is the shop owner. He stated that the deceased and P.W. 2 Ramaben Exh.21 and P.W. 3 Maniben were making purchases. However, this witness has not identified the assailant. It also appears from the deposition of this witness that the incident took place outside his shop and he saw that the appellant – assailant came from behind. This witness also admitted that when he came out of his shop the incident was already over. He has also admitted that he does not know what had happened. In view of this, this witness who is the independent witness also does not support the prosecution case.

26. The prosecution has examined panch witnesses to prove the panchanama of place of offence, arrest of the appellant and panchanama of recovery of weapon. These panch witnesses have been declared hostile.

27. There is no other evidence on record to connect the appellant with the offence charged

against him. The evidence of panch witnesses relating to the scene of offence, recovery of weapon and arrest of the appellant does not inspire any confidence and therefore that part of the evidence cannot be relied to connect the appellant with the offence charged against him.

28. It also appears from the prosecution case that the incident had taken place at the shop i.e. Sahjanand Novelty Stores where the victim and other witnesses were purchasing the articles. The evidence of P.W. 3 Maniben Exh.23 also indicates that the incident took place in the shop. But P.W. 8 Rajesh Gokaldas Exh.29 the owner of the shop has stated in his deposition that the incident had taken place outside his shop.

29. The prosecution has also produced the map of scene of offence at exh. 12 before the trial court. It also appears from the said map that the incident took place at a distance of 9' – 9” from Sahjanand Novelty Stores on the main road. In view of this evidence, there is discrepancy about the place of offence. All these discrepancies raise serious doubt about truthfulness of the prosecution case.

30. Learned advocate Mr. Y.S. Lakhani for Mr. Kedar G. Dave for the appellant has relied on the decision of this Court in the case of Valkubhai Rambhai Kathi Vs. The State of Gujarat, reported in 1998 (2) G.L.H. 846. In the reported decision also the incident had taken place in broad day light and in the bazaar area and independent witnesses were not examined by the prosecution and witnesses had made lots of improvements on material aspect and this Court did not accept the evidence of the witnesses and conviction was set aside. In the present case also the incident had taken place in broad day light at market area and the statements of the independent witnesses were recorded. However, no independent witnesses except P.W. 8 Rajesh Gokaldas Exh. 29 owner of Sahjanand Novelty Stores were examined. The independent witnesses also did not support the prosecution case in material aspects. Therefore, in view of this judgment, the appellant cannot be convicted.

31. In support of his contention learned A.P.P. Mr. Prachchhak has also relied on the decision of the Apex Court in the case of Banti alias Guddu Vs. State of M.P. reported in 2004 Supreme Court Cass (Cri.) 294, wherein the Apex Court held that it is for the prosecution to examine

the witnesses and simply because the witnesses related to the victim only are examined, the prosecution cannot be thrown away. On perusal of the aforesaid decision of the Supreme Court, it appears that the Supreme Court has in the facts and circumstances of the case held that where the prosecution has cited two categories of the witnesses to the occurrence, one consisting of persons closely related to the victim and the other, consisting of witnesses who have no such relation, the Public Prosecutor's duty to the court may require him to produce witnesses from the latter category, subject to his discretion to limit to one or two among them. But if the Public Prosecutor got reliable information that any one among that category would not support the prosecution version he is free to state in court about that fact and skip the witness from being examined as a prosecution witness. In the present case, the record does not indicate that the Public Prosecutor had made any such statement before the trial Court. Even the record does not indicate that the independent witnesses were not likely to support the prosecution case. In view of this, above referred to judgment of the Apex Court relied upon by the learned A.P.P. is not applicable to the facts of the present case.

32. In view of above discussion, on relying upon the evidence adduced before the trial Court, we are of the considered opinion that the trial court was not justified in recording conviction of the appellant on the basis of the evidence adduced before it. Therefore, the judgment and order of conviction passed by the trial Court is required to be set aside and this appeal is required to be allowed.

33. For the foregoing reasons, this appeal is allowed and the judgment and order of conviction dated 20.10.1997 passed by the learned Additional Sessions Judge, Junagadh in Sessions Case No.64 of 1995 is set aside and the present appellant Harijan Dama Soma Parmar is acquitted for the offences charged against him and he is ordered to be set free forthwith, if he is not required in any other offence. The fine, if paid, be returned to the appellant.

(A.L. Dave, J.)

(Bankim N. Mehta, J.)

/JVSatwara/